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MATERIALS FOR

AN INTRODUCTION TO RESTITUTION

1990-1991

Prof. R.E. Scane
Faculty of Law
University of Toronto

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Preliminary Notes

"The law of restitution is the law relating to all claims, quasi-contractual or otherwise, which are founded upon the principle of unjust enrichment"
Goff & Jones, 3rd ed. (1986) p. 1
(opening words)

"A person who has been unjustly enriched at the expense of another is required to make restitution to the other."
(Restatement of Restitution)

These two broad statements from great formative treatises, the latter the earlier, American one, and the former, the later, English text, indicate the unifying theme of principle for a "new" subject area of the law. By a "new subject area", we simply mean that many different types of functional relationships between persons which have given rise to disputes between them, and which the law has dealt with almost from its beginnings, are seen, by at least some - and by now, an increasing number - of those who study and work with the law as being species of the same genus. That vision is by no means universally shared in the legal world derived from the English common law, and indeed, the major bastion of official judicial resistance to it may well be England itself. In 1977, Lord Diplock, in Orakpo v. Manson Investments Ltd., [1978] A.C. 95, 104 [1977] 3 All E.R. 1, 7 (H.L.) asserted that England knew no general doctrine of "unjust enrichment".

In Canada, the Supreme Court of Canada has accepted the concept of "unjust enrichment" in a number of leading cases, and our own attitude to this tool for analyzing and solving disputes between people is far more receptive than has yet been the case at the highest levels of English jurisprudence.

The subject area is "new" only in a comparative sense. The major initial conceptual work was done by scholars (particularly Ames, Seavey, and Scott) at Harvard. This evolved into the publication of the American Law Institute's Restatement of Restitution, in 1937. The initial major work in English jurisprudence was Goff & Jones, "The Law of Restitution", whose first edition appeared in 1966. The analysis of the concepts which unify the areas of personal interrelationship and dispute which we may choose to label as "Restitution" or as "Unjust Enrichment" and include within the covers of a general explanatory text, are taking place a century or more after the treatise-writers in U.S.A. and the U.K. had taken up the same task in the fields of contract and tort. It is not surprising that, even overcoming the hurdle of whether the genus "restitution" exists as a truly unified area for analysis and use as a dispute-solving tool, there is yet, even among its adherents, no universally recognized set of limits to the subject. There are many functional areas, or species, which all of its scholars place within the genus, but the subject is by no means regarded as closed-ended.

As a crude generality, the Restatement brought together two broad categories of doctrine. The first, emanating from a "common law" heritage, was quasi-contract. The second, emanating from a "chancery" or "Equity" heritage, was the constructive trust. In American law, the latter had itself evolved into a far more widely operating tool for effecting remedies, in cases which would be classed as "unjust enrichment" situations, than has been the case in U.K. law. The present Supreme Court of Canada does not share the U.K. suspicions concerning this doctrine, and is following, at least in general terms, the much more sweeping use of the constructive trust as a remedial device for "unjust enrichment", which is common in American jurisdictions. In so doing, Canadian courts will, almost of necessity, be led to further analysis and elaboration of what is the "unjust enrichment" which leads to the remedies of restitution.

It is to the "quasi-contract" root that we wish to look in this introductory stage. Both the terms "quasi-contract" and "constructive trust" suggest a species of "contract" or "trust" law respectively. Both suggestions are subject to challenge, but the suggestion, derived from the use of the term "quasi-contract", that the obligations and rights between the litigating parties flow from some theory of bargain, even a bargain implied by law, has had damaging consequences for theoretical analysis and indeed, for practical application of the law. Theoretical "text-book" treatment of "quasi-contract" tended to be found in textbooks on contract law, as an appendix to the principal theme of enforcement of true consensual arrangements, which was of primary interest to the contract writers. This reinforced the belief that "quasi-contract" was a branch of bargain theory, into which elements of true contract theory should be imported. This came about largely because lawyers of later generations lost familiarity with the means by which earlier generations had used certain fictions in the law to evolve to meet the needs of a developing society.

For this reason, it is desirable to examine briefly the historical origins of the "quasi-contract" element in the subject of restitution.

Development of "Quasi-Contract" Actions in the Common Law Courts

To begin with, we must be prepared to look at the litigation process in which the law is hammered out from a different vantage point than we usually do today. Today, we tend to investigate the relationship between the parties to a dispute in order to determine the rights and obligations which flow out of that interrelationship, and from that point, determine what remedies, if any, we will afford to one of the parties against the other.

In the law's formative years, the emphasis tended to be, or at least to appear to be, in the other direction. There were certain forms of action which afforded certain remedies. If a plaintiff could aver that the facts of the relationship with the defendant were such as to invoke the remedy provided by an existing form of action, (and later, of course, prove this by the appropriate means of proof) he or she could succeed. If the case could not be brought within one of the forms of action, the claimant was remediless. The available procedures, and the struggles and subterfuges used to broaden existing procedures, or create new ones, to fill gaps in the

set of remedies needed by society, shaped the substantive law, to a substantial degree.

Plaintiffs wishing to commence proceedings in the Royal courts were required to purchase a royal letter, or writ, from the Royal Chancery, to authorize the court to hear the plea. A writ did this indirectly by directing an appropriate county sheriff to commence some sort of process against the defendant, and return the writ to the justices with a note of the action taken. Although, in earlier medieval times, there appears to have been considerable flexibility in devising new wordings for writs, by shortly after the mid-13th century, this flexibility to innovate was seen as undesirable. Thereafter, unless plaintiffs could find a precedent of an existing form of writ which met the needs of their cases, they were, generally speaking, out of court, as far as the Royal courts were concerned.

In the early stage of the evolution of the modern legal system, the types of writs available could be divided into two broad classes - at least in hindsight. These were, (1) writs which were designed to assert rights, and to establish rights prospectively and (2) writs which were designed to seek a remedy for a wrong done in the past. The division over-simplifies, of course, for the idea of "wrong" subsumes a concept of transgression of some "right", and the assertion of a "right" in a court may well be precipitated because the plaintiff believes that he or she has been wronged, i.e. that some "right" has been infringed by the defendant. But, accepting this, it is convenient to speak of two broad classes, the so-called "**praecipe**" writs, and writs which will come to be classed as "**trespass**" writs.

The **praecipe** writs (derived from the fact that the sheriff was instructed to command (**praecipe**) the defendant to do right in some particular manner, or explain himself or herself to the King's justices) had a number of forms. Among them were the writs designed to assert various rights in land, which would lead to restoration of the land, or some interest in it, to the plaintiff - the so-called "real" actions. With these we are not concerned. Those which are of interest for our immediate purposes are the writs of "**debt**" and "**account**", and, to a lesser extent, "**covenant**".

> Command [the defendant] that justly and without delay he render to [the plaintiff] [the debt amount] which he owes to him and unjustly detains ... and unless he will do this ... summon [the defendant] that he be before our Justices ... to show wherefore he hath not done it ....
>
> Command [the defendant] that she render a reasonable account [of her dealings] ... to the plaintiff ... and unless she will do this etc.
>
> Command [the defendant] that justly and without delay he keep to B the covenant between them made [to do] ... and unless he will do this, etc.

These praecipe writs, in form, give the defendant the option of complying, or explaining non-compliance to the justices. Legal historians now believe this "option" had become a fiction at least by the end of the medieval period, and that these writs initiated the action from the time they were issued, rather from the time of non-compliance, as seemed to be indicated on their face.

The Action of Account

If the court decided, on the return of the writ, that the plaintiff had made out a case to have the defendant account to him or her, the defendant, who presumably to this time had wrongfully resisted rendering an account, was committed to prison, and "auditors" were appointed to hear the accounting between the parties. Strange as it appears today, the judgment of the court merely ordered the imprisonment and accounting. It did not include any order for payment of what, if anything, might be found due. If the defendant still failed to pay the amount found due on the account, a further action in debt would be required to secure an order for payment. The accounting would establish the sum certain, which debt actions were designed to collect.

The early use of the action of account appears to have been to compel bailiffs (managers of landed estates) and guardians of heirs of socage lands to justify their accounts to their principals or wards. Historians are finding evidence that, by the 14th century, the action was being extended to more commercial relationships, akin to what we would now think of as commercial agency relationships. Then, it was extended to apply to anyone who received money under some obligation to account for it to the plaintiff, and eventually, the action would lie even where the recipient was not, prior to receipt, in some existing agency-type relationship to the plaintiff.

So, if A paid money to B for the benefit, or use, of C, and B failed to pass it over, C was allowed an account against B, even though there was no relationship of what we would now consider a contractual nature between them.

Similarly, on the same set of facts, A was allowed to bring account against B, although B was under no contractual duty to pay anything to A. B was nevertheless accountable to A

> [Remember, once the account was settled between plaintiff and defendant, either as a result of the action, or consensually, any amount found due and owing became a sum certain which could be sued for in an action of debt.]

By the late 16th century, the courts were deciding that, if A made a payment to B by mistake, B would be liable to account to A for it. The reasoning here was that A was not considered to have parted with the beneficial ownership by the payment, even though B could not, in the ordinary sense, be considered a debtor of this amount.

The effect of these extensions was to develop two broad sub-classes within the limits of the action of account.

(1) The working out of accounts over a series of transactions between the parties, as, for example, between principal and bailiff. This subclass represented the original purpose of the action of account.

(2) Actions for an account of some specific sum which, at least originally, could not be directly recovered in an action in debt.

However, actions of account gradually died out, as its cumbersome procedures, and lack of any order for payment, led parties to seek easier and more direct procedures. Gradually, courts began to permit plaintiffs to bring actions for debt in situations where formerly, only actions for account would lie. This was particularly true in the second category of cases, where the accounting was for a single specific sum. It is this class in which we are particularly interested.

In summary, **debt** will swallow "**account**".

The Action of Debt

The action of **debt** is of similar antiquity to **account**. It lay for payment of a sum certain owed, usually as a result of a sale or loan transaction, or for the yielding up of a certain quantity of fungible goods mixed with other, similar goods. [Because the goods were fungible, plaintiff could have no specific property right in any goods. If the goods were not fungible, an action of **detinue** would lie to recover the specific property.] The action did not lie for what we would now consider as breach of an executory promise to pay - this was the sphere of an action in **covenant**, and the executory promise, to be enforceable in **covenant**, had to be made in writing and under seal.

The limitations of the actions for **debt** and **covenant** and the procedural difficulties [e.g., "wager of law", in debt, with the consequence that one could not sue an executor for the deceased's debts, because executors could not wage law on behalf of their deceased] led pleaders at the bar to seek ways around the limitations. They began to explore the trespass type writs, as an alternative to the "**praecipe**" writs. ["Wager of law" was a proceeding open to a defendant in an action of debt. The defendant could successfully establish a defence to a claim for debt by swearing that he was not indebted, and by bringing into court eleven neighbours to swear that they believed the denial to be true.]

Assumpsit

Actions of a trespass nature were admitted originally into the Royal courts, as distinct from local courts, because, in particular cases, it was pleaded that the transgression against the plaintiff was by force and arms,

against the King's Peace. Over time, the necessity of pleading that the actions of the defendant were "Vi et armis et contra pacem" disappeared. While the pleadings "vi et armis" had evolved into a number of standardized formats, in those situations where pleaders sought a writ not relying on this formula, they began to allege the facts of the actual case at bar in their writs - the so-called "actions on the case". How "trespass" and "case" then evolved more or less separately is another story, but one which does not concern us here.

What does concern us is that, once "case" had evolved, permitting actions for wrongs which were not alleged to have involved a breach of the peace to be tried in the Royal courts, lawyers began to explore their possibilities, not only in their obvious fields, but gradually, as an alternative to, or a cure for, the limitations of the older praecipe actions.

The action on the case created a convenient way to sue someone who, having undertaken to do something, did it badly (as distinct from failing to do it at all). By the 15th century, writs instituting complaints of this nature alleged that the defendant "took it upon himself" to do a certain thing [assumpsit super se], and then did it improperly, causing loss or damage to the defendant. From this phrase, the word "assumpsit" came to refer to an action, of a trespass nature, based upon improper performance of an undertaking.

The next major jurisprudential leap was to extend "assumpsit" to non-feasance, as distinct from misfeasance. The only basis for complaint concerning non-feasance must be that there was a duty to act. If that duty was to be based upon some promise or undertaking then that was the province of the old praecipe writ of covenant, which would lie only for promises made under seal. Gradually, the objection to utilizing trespass type actions based on assumpsit in non-feasance situations wore away as well, and appears to have largely disappeared by about the beginning of the 16th century. Again, the exact path by which this happened does not concern us, for our immediate purposes.

What does concern us is how the trespass-type action of assumpsit came to take over the province of the old praecipe action in debt, just as debt had assumed most of the field of operation of the old action of account.

Lawyers, seeking a simpler proceeding than debt, began to institute actions in assumpsit, essentially alleging that the defendant, being indebted to a plaintiff for some specified reason, had undertaken subsequently to pay the amount owing. The plaintiff then alleged that, relying on that undertaking, he had suffered some consequential damage. For example, the plaintiff might allege that he had in turn entered into undertakings with others, which he could not perform because of the defendant's failure to honour his undertaking, whereby the plaintiff suffered further loss. The allegations originally emphasized the consequential harm, to distinguish the claim from a mere claim to recover the amount promised, which was what the action in debt was about.

However, in the King's Bench (which had no jurisdiction in debt actions and was anxious to increase its "market"), this form of assumpsit evolved further. The damages recoverable first included the original, unpaid debt. Then, recovery of that debt alone could justify the action. In the King's Bench (although not in Common Pleas), the subsequent separate promise or undertaking to pay, which was the theoretical foundation of the assumpsit action, eventually did not have to be proved. It became merely a fictional allegation in the writ.

In Slade's Case, (1602) 4 Co.Rep. 92, the battle between King's Bench and Common Pleas was settled by the judges, sitting in the Exchequer Chamber. The effect of the case was that an assumpsit, or undertaking to pay, could be "imported" into all executory contracts, and that debts could be recovered by this form of action. This cleared the way to develop a unified theory of contract law.

However, for the purposes of this course, our concern is not contract, but quasi-contract, and the roots of the difference between them.

Indebitatus Assumpsit

The fictional undertaking to pay an amount owed, which came to be the basis of most "assumpsit" actions, was expanded during the 17th century into areas beyond the realm of what we would now consider as contract, based upon any bargain or consensus between parties. The extension probably started with claims to recover certain types of customary dues. The dues would be an amount owed. The plea would be that, owing the dues, the defendant promised to pay them. The courts came to hold that the "owing", or debt itself, would support the action. The allegation of a subsequent promise to pay, made in return for consideration (often an alleged extension of time to pay) was recognized as purely a fictional matter of form. The "indebitatus assumpsit" action merely recognized the traditional form of pleading, i.e. "being indebted, [the defendant] undertook to pay." This general formula, embracing the fictional promise, came to be employed in a number of different situations. Sometimes the reason for the underlying alleged indebtedness was spelled out in some detail, but often a very short, standardized formula was used. These standard pleading formulas became known as the "common counts".

The most important of these "common counts" was the action for "money had and received to the use of the plaintiff". Remember that debt had taken over the old action of account, for all practical purposes. Indebitatus assumpsit actions in turn supplanted debt in most of the applications, including those applications which debt had taken over from account. So in our earlier situation where A paid to B money which B was to pay to C, or where A paid money to B under a mistake, - situations covered by the old action of account - then the common count for "money had and received" would lie. The allegation in the count in the writ would be that, B being indebted to C for money had and received by him to C's use" ... had promised to pay that money, etc.

Other types of "common counts" in **indebitatus assumpsit** actions which concern us in the topic of restitution were quantum valebat and quantum meruit counts. There were used where goods or services were supplied to the defendant without a price being fixed.

It is in this area that the confusion between "contract" and "quasi-contract", which is relevant for our purposes, arises. In many "**assumpsit**" actions, there was a true underlying bargain or contract, and indeed, that might well be true in some actions for money had and received, or quantum meruit, or quantum valebat. In those cases, even if there was no express promise to perform one's undertaking, the "fiction" was pretty close to the truth. The "promise" to satisfy the obligation could reasonably and readily be implied from the relationship into which the parties had bargained themselves. But in many other of these actions, including many for which account would formerly have been brought, there was no underlying bargain. The **assumpsit**, or promise, was a pure fiction, so recognized, to justify the use of what was essentially a tort action in its inception, to obtain the desired relief. But because, historically, both lines of claims for recovery of money - those based upon a dealing in the nature of a contract between the parties, and those where the common law had long afforded relief where there was no consensual bargain - became suable in a form of what was originally, in theory, a trespass action, based on injury done to the plaintiff through his reliance on an undertaking, the belief grew up that all of the relief granted by these old common counts in **indebitatus assumpsit** was based upon an implied contract or bargain between the parties. The confusion was exacerbated when courts, seeking to articulate the basis of claims which did not arise out of a bargain between the parties but fr an obligation implied by law, recoverable in **assumpsit**, spoke of the obligation arising "as if it were upon a contract" - "**quasi ex contractu**".

Moses v. MacFerlan

(1760), 97 E.R. 676, 2 Burr. 1005 (K.B.)

[Moses, the payee and holder of four promissory notes for 30 shillings each, made by J., endorsed the notes over to Macferlan , to enable Macferlan to recover the amounts of the notes from J. in an action in his own name. Generally, the endorser of a negotiable instrument is liable to the endorsee, if the instrument is not honoured in accordance with its terms. However, Macferlan had not only assured Moses that Moses would not suffer prejudice by endorsing over the notes, but agreed in writing that Moses should not be liable on the notes. Nevertheless, Macferlan later sued Moses, in an inferior court (which you may think of as an equivalent to a small claims court), as endorser of the notes. When Moses sought to prove the agreements between them, that court held that the determination of the existence and effect of such agreement was beyond its jurisdiction. It did have jurisdiction over liability of parties to the instrument, and, as Moses admitted the endorsement, he was found liable, and paid the judgment against